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No. 80-1216

In the Supreme Court of the United States

OCTOBER TERM, 1980

CORTES W. RANDELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's prosecution for mail fraud violated his privilege against self-incrimination because one aspect of the fraud involved his effort to persuade others to conceal his activities from the authorities.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 630 F. 2d 1023.

JURISDICTION

The judgment of the court of appeals was entered on October 2, 1980. A petition for rehearing (Pet. App. B) was denied on November 19, 1980. The petition for a writ of certiorari was filed on Monday, January 19, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner and a co-defendant, John B. Mumford, were convicted on seven counts of mail fraud, in violation of 18 U.S.C. 1341; five counts of securities fraud, in violation of 15 U.S.C. 77q(a)

and 77x; four counts of interstate transportation of securities and money obtained by fraud, in violation of 18 U.S.C. 2314, and one count of submitting a false statement to a United States agency, in violation of 18 U.S.C. 1001. Petitioner was sentenced to concurrent five-year terms on four mail fraud counts (Counts 1-4), and concurrent two-year terms on the remaining mail fraud counts (Counts 5-7), to run consecutively to the five-year terms. Imposition of sentence on the other counts was suspended in favor of a five-year term of probation, to run consecutively to the sentences on the mail fraud counts. The court of appeals affirmed (Pet. App. 1-11a).[1]

1. In 1974, petitioner and Mumford were officers of two Virginia corporations, the National Commercial Credit Corporation (NCCC), and the Federal Mortgage Acceptance Corporation (FMAC). Both dealt in second mortgages. Their business involved the purchase of homes with assumable mortgages, the sale of the homes for small down payments and a second trust note or mortgage, and the use of these mortgages to obtain money for further operations by selling them or pledging them as collateral (Pet. App. 3-4a; Tr. 90-92, 228). The evidence showed that petitioner and his co-defendant used their corporate positions to obtain money from private investors and lending institutions through fraudulent misrepresentations, false promises, and omission or concealment of material facts.

In 1973 petitioner was hired by the two founders of NCCC for the purpose of raising additional capital and preparing it for a public offering of its stock. Shortly thereafter, petitioner's wife loaned NCCC $140,000 and received

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[1]Co-defendant Mumford was sentenced to three years' imprisonment on the false statement count, with all but six months of the term suspended, and to concurrent five-year probation terms on all counts (Pet. App. A 2a). His petition for a writ of certiorari is pending in No. 80-5818 (filed December 1, 1980).

as collateral $205,000 worth of NCCC second mortgages whose value was subsequently increased to $279,000 (Tr. 93-96, 105-106). Through such investments, petitioner increased his control over NCCC, eventually eliminated its founders from the company, and brought in Mumford as vice president (J.A. 154-156).[2] Because he had been indicted for securities fraud as the result of his management of another venture, petitioner minimized his visibility in the operations of NCCC and represented to financial institutions that he had no interest in it (J.A. 80-81; Tr. 652-653, 683). Nonetheless he performed important functions in its management—shaping corporate policies, dealing with financial institutions to raise capital, directing the distribution of delinquent collateral notes among banks, and dealing with investors and lawyers (*e.g.*, Tr. 175, 232-243, 340-342, 345, 359, 637, 645, 692-693, 894, 954).

In July 1974, petitioner agreed to purchase from another participant in NCCC certain second mortgage notes that the participant had generated in Florida. NCCC purchased $139,000 worth of the notes at 60% of their face value. Simultaneously, petitioner formed FMAC for the purpose of purchasing the remaining notes at 30% of their face value (Tr. 228, 398-399). FMAC was capitalized by use of the second mortgage notes which had served as collateral for the $140,000 loan by petitioner's wife to NCCC (Pet. App. 3a; Tr. 663-665, 670-671).

When, in July 1974, petitioner's wife called the loan due, NCCC elected to forfeit the notes. Mrs. Randell endorsed the notes to FMAC, which, in turn, carried them as corporate assets on its July 1974 balance sheet and endorsed them over to secure a loan from the Maryland Industrial Finance Corporation (Pet. App. 4a; Tr. 585-586, 693-695, 701-702).

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[2] "J.A." denotes the joint appendix in the court of appeals.

Despite the fact that these second mortgages were listed on FMAC's balance sheet as assets, they continued to be carried on NCCC's books as assets of that company, and, although Mrs. Randell had called the loan for which these notes served as collateral in July, she continued to receive from NCCC $1,600 per month as interest on it throughout 1974 (Tr. 585). In extending credit to FMAC and NCCC, Maryland National Bank relied upon these balance sheets, and was not aware until 1975 that the notes were simultaneously listed as assets on the books of both ventures (Tr. 671, 1210; J.A. 208-210). It also relied upon the misrepresentations of petitioner and Mumford that NCCC had been very successful and profitable, and a 1973 year-end NCCC financial statement which overstated that company's profits by $97,000 (Tr. 545, 552, 645, 651-652, 655).[3]

NCCC had also raised money from private investors. In 1971 it made a $300,000 bond offering for 10% bonds to be secured by second trust mortgages equal to 125% of the amount borrowed. The bond prospectus promised that the collateral "will be held in the bank" (Pet. App. 4a; Tr. 97, 179, GX 3-B). In August 1974, petitioner and Mumford endeavored to persuade the secured bondholders to exchange their 10% secured bonds for unsecured 12% bonds. In connection with this effort, the two drafted and mailed a letter to bondholders detailing the conversion offer but omitting certain material facts which made the offer misleading. These included the fact that both petitioner and Mumford were simultaneously engaged in the operations of NCCC and its competitor FMAC, that petitioner's wife had demanded payment of the NCCC loan and endorsed over to FMAC the second trust mortgage notes which had been

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[3]By July 1975, Maryland National had loaned more than $600,000 to NCCC (Tr. 660). During 1974 it loaned more than $300,000 to FMAC (Tr. 814-815). A Maryland National Bank official testified that, absent the concealment and misrepresentations, the loans would not have been made (Tr. 690).

collateral on the loan, and that petitioner had previously been convicted of securities fraud (*e.g.*, Tr. 881-882, 898-899, 924-925, 946). To further reassure the bondholders considering the exchange, petitioner and Mumford met with several of them. Petitioner told one investor that NCCC was in sound financial condition when, in fact, it was not, and gave him a copy of the false financial statement. Mumford assured another investor that NCCC was going to be in good shape (Pet. App. 4-5a; Tr. 876, 894-986, 961).

In early 1973, Harold Brammer, one of the founders of NCCC, discovered that the second mortgages that had been placed in a bank safe deposit box to secure the 1971 10% bond issue were missing (Tr. 101). After he filed a civil suit, he was permitted to inspect bond collateral which, in the meantime, had been assembled and placed in a safe deposit box to which Mumford had sole access. Brammer discovered that the mortgage notes, which ostensibly secured this issue, included some that previously had been declared worthless as collateral; still others were pledged to lending institutions as collateral for other loans; and some were among those endorsed over to FMAC by Mrs. Randell (Tr. 101-107, J.A. 257). Petitioner and Mumford both assured Brammer's attorney, falsely, that Mrs. Randell's endorsement of the note to FMAC was merely a formality, and that the notes were actually the property of NCCC because the loan which they had secured had been paid (Tr. 178, 180-181).[4]

2. The scheme proved by this evidence was described in 12 pages of detail in Count 1 of the indictment. Near the end of the description, the indictment included a paragraph alleging (J.A. 17):

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[4]These misrepresentations were made on July 18, 1974, during the same month that an FMAC balance sheet for July 3, 1974, listing these notes as FMAC assets was submitted to Maryland National Bank as part of FMAC's credit application (Tr. 662-663).

> It was further a part of the scheme and artifice to defraud that [petitioner] and John B. Mumford would and did conceal and cause to be concealed from investors, financial institutions, the State Corporation Commission of Virginia, the Veteran's Administration, the United States Securities and Exchange Commission, and a federal grand jury, the scheme and artifice to defraud * * * described above in Paragraphs 2(a) thru (w) of this Count.

Prior to the trial petitioner moved to dismiss the indictment on the ground that the allegation that he concealed evidence from "a federal grand jury" violated his Fifth Amendment privilege against self-incrimination. The motion was denied; however, the government agreed to strike the grand jury phrase from the mail fraud count (J.A. 33-34, 46-47).[5]

At trial, the government presented evidence establishing that in July 1975 petitioner instructed Mumford not to meet with representatives of the Virginia State Corporation Commission, to resign his position with NCCC, and to "stonewall" all inquiries relating to the resignation (Tr. 1173-1174; GX 34-I). In January 1976, when the Securities and Exchange Commission was conducting an investigation of NCCC's activities, petitioner advised Barbara Fisher, then an NCCC employee, to be careful of what she

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[5]Evidence had been presented to the grand jury showing that in September 1978, when Barbara Fisher, a former NCCC employee was scheduled to meet with an SEC attorney at the office of an Assistant United States Attorney (J.A. 389-390), petitioner attempted to persuade her not to testify before the grand jury then in session. Specifically, petitioner offered to furnish her legal counsel at no cost or at low cost, told her that the government "was going to try to indict her on some sort of technicality," advised her that she did not have to testify before the grand jury, and that, if subpoenaed, she could "tell the foreman of the Grand Jury you don't want to testify and you are taking your Fifth Amendment right" (J.A. 390, 391, 395, 397).

said during an interview at the U.S. Attorney's office, or else he would say "[she] was the cause of the investors losing their money" (Tr. 282-283, 1096).

ARGUMENT

1. Citing allegations in the original indictment that he concealed his fraudulent activities from the Securities Exchange Commission and a federal grand jury, petitioner contends (Pet. 7-11) that he was prosecuted for "failing to reveal his crime to the government," in violation of his privilege against self-incrimination. In the context of the facts of this case this claim is frivolous.[6]

Petitioner was not indicted or convicted for failing to disclose his crimes. He was prosecuted for using the mails in furtherance of an elaborate financial swindle, and the overwhelming bulk of the charges and evidence against him concerned solely the machinations directly involved in the scheme.

It is true that operating the swindle depended to some extent on keeping a patchwork of creditors and investors satisfied that their money was safe; this, in turn, required that petitioner fend off authorities whose investigation might have exposed his deceptive accounting and other fraudulent practices. To the extent that the government sought to prosecute petitioner for concealment in aid of his fraudulent scheme, however, its proof was not, and did not purport to be, that petitioner refused to come forward with

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[6]It is at the outset doubtful that petitioner's claim is properly before this Court. In the district court, petitioner raised a Fifth Amendment objection to only that portion of the indictment that alleged concealment from the grand jury. The government subsequently agreed to eliminate that aspect of the charge, and it was withdrawn. Since petitioner at the time raised no self-incrimination issue with respect to the allegation that he concealed his fraud from authorities other than the grand jury, he is in no position to press that issue in this Court.

incriminating self-disclosure. Rather the government's evidence showed simply that petitioner encouraged or threatened *others* not to come forward, as part of his effort to obstruct official investigations of the NCCC (see Pet. App. 10a).[7] A prosecution based on evidence of this character does not even arguably implicate a defendant's right to refuse to incriminate himself. Indeed, a contrary conclusion on the facts of this case would suggest that a suspected wrongdoer would be constitutionally entitled to engage in obstruction of justice.

Petitioner is thus not aided by the cases he cites (Pet. 8) holding that the Fifth Amendment protects persons with knowledge of criminal activities from being required to report that information to authorities when such disclosures might result in the informants' prosecution. See, *e.g.*, *Lefkowitz* v. *Turley*, 414 U.S. 70, 77 (1973); *United States* v. *Jennings*, 603 F 2d 650, 652 (7th Cir. 1979); *United States* v. *Kuh*, 541 F. 2d 672, 676-677 (7th Cir. 1976); *United States* v. *King*, 402 F. 2d 694, 697 (9th Cir. 1968).[8]

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[7]It was when he called Barbara Fisher to inquire about her pending meeting with an SEC attorney that petitioner attempted to induce her to be wary of possible indictment by the United States Attorney on "some sort of technicality" (J.A. 390-39). It is not the case, then, as petitioner urges (Pet. 10) that "there was simply no evidence at trial to support the charges that petitioner took affirmative steps to conceal his crime from the SEC"; and the court of appeals accordingly did not err in referring (Pet. App. 10a) to "evidence which showed an attempt by Randell to persuade Ms. Fisher to be less than candid about NCCC's operations when she met with the SEC attorney."

[8]Although these cases suggest that the commission of an affirmative act of concealment does not make it constitutionally permissible to punish the actor for a refusal to make self-incriminating statements to the authorities, they do not stand for the converse, *i.e.*, they do not suggest that the Fifth Amendment privilege insulates persons from punishment for affirmative acts of concealment of crime that extend beyond nondisclosure. See *United States* v. *Daddano*, 432 F. 2d 1119, 1125 (7th Cir. 1970), cert. denied, 402 U.S. 905 (1971). See also *United States* v. *Apfelbaum*, 445 U.S. 115, 127 (1980) (Fifth Amendment privilege does not bar prosecution for perjury).

2. There is also no merit to petitioner's contention (Pet. 11-12) that the concealment allegation in the indictment violates the principles announced in *Grunewald* v. *United States*, 353 U.S. 391 (1957). In *Grunewald*, this Court held that the duration of a conspiracy cannot be lengthened indefinitely for the purpose of bringing it within the statute of limitations merely by alleging that it was part of the scheme to take steps to keep the conspiracy a secret after its central criminal purpose had been accomplished (*id.* at 402).[9] The Court noted, however, that "a vital distinction must be made between acts of concealment done in furtherance of the *main* criminal objective of the conspiracy, and acts of concealment done after these central objectives have been attained" (*id.* at 405). Here, concealment of the scheme from government investigators and investors was an ongoing component of the scheme, undertaken to permit continued use and acquisition of the fraudulently obtained funds. Thus, the act of concealment was properly alleged in the indictment as an integral part of the overall scheme. See *United States* v. *Portner*, 462 F. 2d 678, 681 (2d Cir.), cert. denied, 409 U.S. 983 (1972).

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[9]Of course, in contrast with *Grunewald*, the concealment allegation in this case neither appeared in a conspiracy charge nor was necessary to bring the offense within the statute of limitations.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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